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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1345.

INTERNATIONAL SALT COMPANY,
Petitioner,

v.

THE STATE OF NEW JERSEY, on Behalf of Itself and All Others Similarly Situated, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No.

INTERNATIONAL SALT COMPANY,

Petitioner,

v.

THE STATE OF NEW JERSEY, ON BEHALF OF ITSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, International Salt Company, prays that a writ of certiorari be granted to review the decision of the United States Court of Appeals for the Third Circuit rendered in this action on December 8, 1967; petition for rehearing denied, January 22, 1968.[1]

CITATIONS TO OPINIONS BELOW.

The interlocutory order and supporting opinion of the United States District Court for the District of New Jersey, printed in Appendix B hereto, *infra*, p. A-2, is not officially reported. The opinion of the Court of Appeals for the Third Circuit, reversing the decision of the District Court is reported in 387 F. 2d 94. It is printed in Appendix B hereto, *infra*, p. A-38.

1. Additional respondents beside the State of New Jersey are: County of Bergen, a body politic and corporate of the State of New Jersey; New Jersey Highway Authority and New Jersey Turnpike Authority.

JURISDICTION.

The decision of the Court of Appeals for the Third Circuit was entered on December 8, 1967. Rehearing was denied on January 22, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Under Section 5(b) of the Clayton Act, was the normal four-year period of limitation applicable to the private antitrust claims of the State of New Jersey asserted against petitioner herein, suspended by the pendency of a government civil antitrust action in Minnesota, to which petitioner (having entered a consent decree) was not a party, and in which the matter complained of was limited to alleged antitrust violations affecting a six-state area in the mid-west (not including New Jersey)?

2. Where the law existing in 1963, when petitioner entered a consent decree in the government civil antitrust action, specifically and uniformly provided that the continued pendency of the government action did not suspend the statute of limitations as to petitioner, and accordingly the statute ran on claims against petitioner one year later, in 1964, can a subsequent "change" in the law (based upon decisions of this Court in 1965) be applied retroactively to revive petitioner's liability and permit the instant claims to be maintained?

STATUTE INVOLVED.

The statutory provision involved is section 5(b) of the Clayton Act, 15 U. S. C. Section 16(b). It is printed in Appendix A, *infra*, p. A-1.

STATEMENT OF THE CASE.

On June 28, 1965 the State of New Jersey filed a document purporting to commence this action (R. 1a). This document was never served on any defendant, and there is a dispute between the parties as to whether it validly commenced the action. We shall assume, however, in accordance with respondents' contention, solely for purposes of this petition, that June 28, 1965 does represent the date of commencement of the action.

The action was brought by the State of New Jersey under Section 4 of the Clayton Act, on behalf of itself and all others similarly situated, seeking to recover from International Salt Company, petitioner herein, and others [2] damages for alleged conspiratorial fixing of the prices paid by the State of New Jersey for its purchases of rock salt (R. 21a-27a).[3] Its claims are governed by the statute of limitations found in Sections 4(b) of the Clayton Act, as supplemented by Section 5(b) of that Act, 15 U. S. C. Sections 15(b) and 16(b) (R. 61a).

Section 4(b) of the Clayton Act provides that any cause of action of the type here asserted shall be forever barred unless commenced within four years after the cause of action accrued. The District Court herein found that respondent State of New Jersey had full knowledge of its claims prior to June 28, 1961 and was, in failing to prosecute them, guilty of negligence and laches (R. 176a) (Ap-

2. The other defendants are: Morton Salt Company; Cayuga Rock Salt Company; Diamond Crystal Salt Company; Charles Schaefer Sons, Inc.; Winans Carter Corp.; and Winans Reliance Corp.

3. Certain state and municipal bodies in the State of New Jersey (County of Bergen, New Jersey Highway Authority and New Jersey Turnpike Authority) intervened as plaintiffs in the action and are respondents herein.

pendix B, *infra*, p. A-35). Accordingly, by the normal operation of this four-year statute the State's claims against petitioner accruing prior to June 28, 1961 are barred.[4]

Section 5(b) of the Clayton Act, however, provides that the existence of a government action may suspend the statute of limitations during the period of the pendency of the government action and for one year thereafter, and that a cause of action may be maintained if commenced either within four years of its accrual or within this period of suspension, provided that it is based "in whole or in part on any matter complained of in the government action."

The State of New Jersey relies upon a prior government civil action commenced against petitioner in Minnesota in 1961 and claims that the instant action was commenced within the period of suspension of the statute created by that action.

This prior government civil action was commenced in the United States District Court for the District of Minnesota on July 11, 1961 against petitioner and others alleging conspiratorial fixing of prices for rock salt sold to cer-

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4. The District Court granted petitioner partial summary judgment on this basis (R. 180a). Regarding the State of New Jersey's awareness of its claims prior to June 28, 1961 the Court said:

> ". . . I am compelled to the conclusion that there has been negligence, laches on the part of the plaintiff, New Jersey, in this case. The claim of collusion, of violation of the antitrust law was open and notorious certainly in 1960. Claims of this nature from reputable people, and statements appeared in various newspapers throughout the eastern seaboard, and it seems to me that New Jersey very clearly on the proofs before me—and I am not determining whether or not there was fraudulent concealment—but on the proofs before me has been negligent, guilty of laches in not proceeding to investigate further and further as to all the publicity,—and this knowledge called for it to do so,—and not proceeding forthwith and filing a suit in this court . . . much sooner." (R. 176a).

tain specified state and municipal bodies in the mid-west.[5] The government's case was specifically limited to sales of rock salt by sealed bid to these purchasers in the six-state area comprised of Minnesota, Wisconsin, Michigan, Illinois, Indiana and Ohio. *United States v. Morton Salt Company,* 1964 CCH Trade Cases ¶ 71,304 (D. Minn. 1964).

On September 30, 1963, before trial of this case (and after petitioner had been acquitted by a jury in a companion criminal case based on the same allegations),[6] petitioner concluded a consent decree with the government and upon the entry of that decree in the record on November 4, 1963 the action against petitioner terminated. Other parties to the action, however, continued to litigate. Ultimately, a final judgment was entered against Morton Salt Company and Diamond Crystal Salt Company on November 24, 1964 concluding that they were guilty of violation of Section 1 of the Sherman Act on sales to the named purchasers in the six-state area set forth above. 1964 CCH Trade Cases ¶ 71,304 (D. Minn. 1964). This decision was affirmed on appeal by this Court on October 25, 1965. *Morton Salt Company v. United States,* 382 U. S. 44 (1965).

It is apparent that, the government civil action upon which the State relies having terminated against petitioner on November 4, 1963 upon the entry of the consent decree, the State's action was not commenced during the pendency of the government proceedings against petitioner or within

5. The named purchasers were: State of Minnesota, City of Minneapolis, City of St. Paul, State of Wisconsin, City of Milwaukee, State of Illinois, Illinois Toll Road, City of Chicago, Chicago Transit Authority, State of Indiana, Indiana Toll Road, State of Michigan, Wayne County, City of Detroit, State of Ohio and Ohio Turnpike. *State of Michigan v. Morton Salt Company,* 259 F. Supp. 35 (D. Minn., 1966) at page 71.

6. The government civil action was a companion suit to a criminal action commenced by the government against the same parties which, after a five-week trial, resulted in a jury verdict of acquittal of all defendants on June 7, 1962.

one year thereafter.[6a] It was, however, commenced during the appeal to this Court of the determination made against Morton Salt Company and Diamond Crystal Salt Company regarding their sales in the mid-west.

Upon these facts the District Court below concluded that the State's action seeking to recover from petitioner for alleged fixing of rock salt prices in New Jersey, was not basd in whole or in part on any matter complained of in the government action as required under section 5(b) and thus strictly applied the four-year statute of limitations (R. 180a) (Appendix B, *infra* p. A-36).

The United States Court of Appeals for the Third Circuit reversed the determination of the District Court holding that the pendency of the government action against Morton Salt Company and Diamond Crystal Salt Company did suspend the statute on the State of New Jersey's instant claims against petitioner.

The Court of Appeals reached this conclusion on the basis of a case decided by this Court on November 8, 1965, namely *Leh v. General Petroleum Corp.*, 382 U. S. 54 (1965).[7] The Court of Appeals acknowledged that the law prior to this decision embodied in a series of cases [8] had for fifteen years clearly and uniformly supported petitioner's position that the continued pendency of the government action against Morton and Diamond did not suspend the statute of limitations as to petitioner. But, said the Court of Appeals,

> "We conclude that . . . the line of cases [relied upon by petitioner] . . . were based upon an interpretation

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6a. See footnote 10, *infra*.

7. The Court of Appeals also derived support for its determination from this Court's decision in *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U. S. 311 (1965) decided on May 24, 1965.

8. Cited at p. 8, *infra*.

of Section 16 [section 5 of the Clayton Act] which was destroyed by the quoted analysis made by the United States Supreme Court in the *Leh* cases." (Appendix B, *infra* p. A-45)

Despite the fact that under the law as it existed in 1963, at the time petitioner entered the consent decree in the government action, there was no suspension of the statute on the State's claims against petitioner, and hence the statute on these claims ran one year later, in 1964, the Court of Appeals concluded that the "change" in the law in 1965 could and should be applied retroactively to revive petitioner's liability.

On January 22, 1968 rehearing was denied.

REASONS FOR GRANTING THE WRIT.

1. The decision of the Court of Appeals in this case is contrary to the line of decisions holding that the continued pendency of a government action against others does not continue to suspend the statute of limitations as to one who has terminated the government action against him by the entry of a consent decree: *Union Carbide & Carbon Corp. v. Nisley*, 300 F. 2d 561 (10 Cir. 1961), appeal dismissed sub nom. *Wade v. Union Carbide & Carbon Corp.*, 371 U. S. 801 (1962); *Grengs v. Twentieth Century Fox Film Corp.*, 232 F. 2d 325 (7 Cir.), cert. denied, 352 U. S. 871 (1956); *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F. 284 (7 Cir. 1954); *Skouras Theatres Corp. v. RKO Corp.*, 193 F. Supp. 401 (S. D. N. Y. 1961); *Tague v. Balaban*, 146 F. Supp. 356 (N. D. Ill. 1956); *Gordon v. Lowe's, Inc.*, 147 F. Supp. 398 (D. N. J. 1956); *Leonia Amusement Corp. v. Loew's, Inc.*, 117 F. Supp. 747 (S. D. N. Y. 1953); *Manny v. Warner Bros. Pictures, Inc.*, 116 F. Supp. 807 (S. D. Cal. 1953); *Electric Theatre Co. v. Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937 (S. D. Mo. 1953); *Barnett v. Warner Bros. Pictures Distrib. Corp.*, 112 F. Supp. 5 (N. D. Ill. 1953); *Alex Theatre Corp. v. Balaban & Katz Corp.*, 1952 Trade Cases, para. 67,357 (N. D. Ill. 1952). By virtue of the decision of the Court of Appeals in this case, there is now a conflict among the circuits on this issue.

2. The decision of the Court of Appeals in this case is based upon the premise that this Court's decision in *Leh v. General Petroleum Corp.*, 382 U. S. 54 (1965) overruled sub silentio in 1965 the existing law represented by the uniform line of decisions cited above. (See quotation from the Court of Appeals opinion, *supra* pp. 6-7) (Appendix B, *infra*, p. A-45).

The *Leh* case did not, however, address the issue presented here. In the *Leh* case this Court held that a private action commenced within a year of the conclusion of government proceedings was timely *as to parties to the government action* even though the private suit sought to add an additional defendant. The Court did not address itself in the *Leh* decision to the issue of whether such an action was also timely as to non-parties to the government action, and, in fact, the suit against the additional defendant who was not a party to the government action was dismissed at the District Court level. This action was noted by this Court in its opinion without comment.[9]

The Court of Appeals was incorrect in concluding that this Court in the *Leh* case, without addressing the issue and without adverting to the existing law represented by the uniform line of decisions cited above, automatically overruled those decisions and "changed" the law.

3. Moreover, the Court of Appeals wrongly concluded on the basis of the *Leh* case that the statute of limitations was suspended on the State of New Jersey's claims where the government action specifically concerned sales to a defined group of purchasers in six mid-western states and in no way involved the State of New Jersey or other eastern states. It has already been held in this litigation that the final judgment in the government action may not be introduced under section 5(a) of the Clayton Act in support of the claims of plaintiffs outside the six-state area defined in the government action. In *State of Michigan v. Morton Salt Company,* 259 F. Supp.

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9. 382 U. S. 54 at page 61, footnote 4. See also 382 U. S. 54 at page 63 noting the similar dismissal of the private suit against a non-party to the government action in *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.,* 216 F. Supp. 507 (D. N. J. 1965).

35 at pages 71-75 (D. Minn. 1966) aff'd on other grounds, 377 F. 2d 768 (8 Cir. 1968) Judge Larson held:

> "Plaintiffs Missouri, Iowa and certain municipalities in the States of Kansas, Virginia and Tennessee share the misfortune of being outside the six-state area with which the government case was concerned. Hence the Court [in the government action] did not pass upon the existence of a conspiracy in these areas, the plaintiffs must prove independently of the decree [in the government action] the existence and operation of [a] conspiracy in their area and its impact upon them."

Judge Larson's decision was consistent with established law that private plaintiffs are entitled to utilize the government decree only if their claims involve the same geographical area involved in the government case. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537 (1954); *International Shoe Machinery Corp. v. United Shoe Machinery Corp.*, 315 F. 2d 449, 456 (1 Cir. 1962), *cert. denied*, 375 U. S. 820 (1963); *Ohio Theater Corp. v. Loew's, Inc.*, 156 F. Supp. 770, 777 (D. D. C. 1957) *aff'd*, 261 F. 2d 380 (D. C. Cir. 1958), *cert. denied*, 359 U. S. 943 (1959).

The Court of Appeals erroneously concluded that the difference in subject matter between what was complained of in the government action and what is complained of in the State of New Jersey action did not preclude a suspension of the statute on the State's claims under section 5(b).

4. The whole question of the circumstances under which the pendency of a government action may suspend the statute of limitations on private claims against different parties or involving different subject matter should be

examined by this Court directly and explicitly. If there is to be a change in the operation of section 5(b) of the Clayton Act, as the Court of Appeals below assumed from this Court's decision in the *Leh* case, such change should be based not upon an assumption as to the meaning and scope of the *Leh* decision (which did not directly discuss these issues) but rather upon a weighing of the policy considerations involved and a clear understanding of the scope and effect of the new law.

The critical importance of certainty in determining rights and liabilities under the antitrust laws has been recognized and confirmed by this Court. *Chattanooga Foundry and Pipe Works v. Atlanta*, 203 U. S. 390 (1906). As the Court stated in *Wood v. Carpenter*, 101 U. S. 131 (1879) at p. 139:

> "Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs . . ."

Numerous cases have raised and will continue to raise the problem presented here. See cases cited at page 8 *supra;* and *Momand v. Universal Film Exchanges, Inc.*, 172 F. 2d 37 (1 Cir. 1948), *cert. denied*, 336 U. S. 967 (1949); *Charles Rubenstein, Inc. v. Columbia Pictures Corp.*, 176 F. Supp. 527 (D. Minn. 1959), aff'd, 289 F. 2d 418 (8 Cir. 1961); *Court Degraw Theatre, Inc. v. Loew's Inc.*, 192 F. Supp. 198 (E. D. N. Y. 1959); *Charles Rubenstein, Inc. v. Columbia Pictures Corp.*, 154 F. Supp. 216 (D. Minn. 1957); *Samuel Goldwyn Production, Inc. v. Fox West Coast Theatres Corp.*, 146 F. Supp. 905 (N. D. Cal. 1956); *Leonia Amusement Corp. v. Loew's, Inc.*, 117 F. Supp. 747 (S. D. N. Y. 1953); *Levy v. Paramount Pictures, Inc.*, 104 F. Supp.

787 (N. D. Cal. 1952); and *Christensen v. Paramount Pictures, Inc.*, 95 F. Supp. 446 (D. Utah 1950). Compare *Hardy Salt Company v. State of Illinois et al.*, (8 Cir. 1967) *cert. denied* (1967).

It has been assumed by the Court of Appeals in this case that the *Leh* decision, in negating the principle of co-extensiveness between sections 5(a) and 5(b) of the Clayton Act, necessarily requires the complete overruling of prior precedent and contemplates suspension of the statute as to persons not parties to the government action even as to claims different in subject matter from those involved in the government case.

Not all courts have, however, accepted this interpretation of the *Leh* case. *2361 State Corp. v. Sealy, Inc.*, 263 F. Supp. 845, 852 (N. D. Ill. 1967).

It is respectfully submitted that more important than guess-work as to the presumptive effect of the *Leh* decision is the direct weighing of the policy factors involved in this area and some clear definition of the present scope of section 5(b): what is meant by the words "based in whole or in part on any matter complained of in [the government] proceeding." Considering the number of private civil actions which follow government antitrust proceedings it is apparent that the issues raised herein regarding the scope of 5(b) will be raised time and time again in the future.

Moreover, a direct weighing of the policy considerations involved is particularly important.

It is apparent that depriving a consent decree entrant of the benefit of the statute of limitations during the continued pendency of the government action against others removes a significant incentive to enter the consent decree. The importance of such consent decrees to the government in securing voluntary action by private companies in compliance with the government's demands, without the time and expense of protracted litigation, has been universally

recognized and the government's interest in preserving the consent decree procedure has universally been considered paramount to private interests. *Swift & Co. v. United States*, 276 U. S. 311 (1928); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 323 F. 2d 412 (7 Cir. 1963), *cert. denied*, 376 U. S. 939 (1964); *United States v. American Society of Composers*, 331 F. 2d 117 (2 Cir. 1964), *cert. denied*, 377 U. S. 997 (9 Cir. 1964); Atty. Gen. Nat'l. Comm. Antitrust Rep. (1955) at p. 30; letter of Donald F. Turner to Emanuel Celler, Chairman of the Committee on the Judiciary, House of Representatives, printed in Antitrust and Trade Regulation Report No. 297, March 21, 1967, pages X-1 to X-3 (printed as Appendix C hereto). Continued future speculation and confusion regarding the effect of the *Leh* decision should be replaced with a sound evaluation of the interests, including the government's interest, involved.

5. The retroactive application of a "change" in the law to this case (if indeed the *Leh* decision was meant to and did change the law as decided by the Court of Appeals) is tantamount to a denial of due process of law. Petitioner herein entered the consent decree in the government action in 1963 at a time when it is undisputed that the existing law had uniformly held for more than fifteen years that the entry of the decree marked the termination of the action and that the period of suspension of the statute ended one year thereafter. Both parties to the present action were aware of this state of the law.[10] Respondents failed to sue

10. Originally the State of New Jersey abandoned any contention that it was entitled to any benefit from the government proceedings for statute of limitations purposes (R. 19b-20b). The State regarded the uniform law as precluding it from this contention. The following colloquy took place between the court and the State's counsel at the hearing on petitioner's motion for partial summary judgment on August 4, 1966:

"The Court: If I understand the pleadings and the briefs correctly, he (counsel for the State) is relying pretty much now

within the year and, accordingly, on November 4, 1964 the period of suspension as to petitioner ended and further suits seeking to assert claims beyond the four-year statutory period were barred.

The "change" in the law effected by this Court's decision in the *Leh* case did not occur until November 8, 1965.[11] This was over a year after the period of suspension of the statute as to petitioner had ended. The determination of the Court of Appeals that this "change" should be applied retroactively to revive the period of suspension as to petitioner, and permit this suit, deprives petitioner of the reasonable expectation upon which it acted. Petitioner is deprived both of the benefit of its bargain with the government at the time of its entry into a consent decree, and of its expectation one year thereafter that actions could be taken on the basis of the fact that the period of suspension had ended and the four-year statute alone controlled.

This Court has long recognized that retrospective application of certain decisions is not permissible when they destroy rights acquired in reliance upon earlier laws. "To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal." *Gelpecke v. City of Dubuque*, 68 U. S. (1 Wall.) 175, 206 (1863).

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on his right or his hoped-for right to amend and plead fraudulent concealment and hence avoid the bar of the Statute of Limitations.

Is that correct, Mr. Gold?

Mr. Gold: That is correct. We admit we did not file a complaint within one year after the conclusion of International's part in the Federal case . . .

The Court: (You are) saying: if we don't have fraudulent concealment here, then we are barred from claiming anything, any damages prior to June 28, 1961, is that correct?

Mr. Gold: That is correct, your Honor." (R. 19b-20b)

11. The case of *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U. S. 331, which the Court of Appeals below considered as furnishing additional support for its theory of a "change" in the law, was decided on May 24, 1965.

> "The true rule is to give a *change of judicial construction* in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the laws by means of a legislative enactment." *Douglass v. County of Pike*, 101 U. S. 677, 687 (1879). (Emphasis added.)

This Court has recently intimated that in the area of antitrust treble damage claims it may be unfair and improper to change the law retrospectively so as to deprive persons of the expectations upon which they have acted. *Simpson v. Union Oil Co.*, 377 U. S. 13 (1964). The lower courts which have considered the question of the retrospective application of changes in the law in treble damages cases have held, as this Court intimated in *Simpson*, that justice requires denial of such retrospective application. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F. 2d 776 (3 Cir. 1967), *cert. granted*, 88 S. Ct. 86 (1967); *Simpson v. Union Oil Co.*, 270 F. Supp. 754 (N. D. Cal. 1967); *Lyons v. Westinghouse Electric Corp.*, 235 F. Supp. 526, 536-7 (S. D. N. Y. 1964).

To change the uniform prior interpretation of section 5(b) and to apply such "change" so as to revive petitioner's *expired liability* herein runs afoul of these declared principles.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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